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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.
13

14 SCOTT HOWARD KIMBALL (1),

15 Defendant.
16

Criminal No. 15CR0902-JLS

**ORDER DENYING
DEFENDANT'S MOTIONS FOR
NEW TRIAL**

[ECF Nos. 112 and 146]

17 Pending before the Court are two motions for a new trial filed by Defendant
18 Kimball, the first filed by trial counsel (ECF No. 112) and the second filed by new
19 counsel appointed after Defendant raised a claim that his trial counsel rendered
20 ineffective assistance during the trial proceedings (ECF No. 146). Oral argument was
21 held on the motions on August 19, 2016. Defendant was represented by counsel Julie
22 Blair, the United States was represented by Assistant U.S. Attorney Jarad E. Hodes.
23 Having now fully considered the submissions and argument of the parties, and applicable
24 authorities, the Court will deny both motions.

25 **Background**

26 Defendant Scott Howard Kimball and a Codefendant, Amanda Lee Garcia, were
27 charged with interference with commerce by robbery in violation of 18 U.S.C. § 1951.
28 (ECF No. 17). The charge stemmed from the robbery of a United State Post Office in

1 the Rancho Bernardo neighborhood of San Diego on January 21, 2015. (Complaint, ECF
 2 No. 1, at 2). Codefendant Garcia entered a guilty plea to a superseding information
 3 charging her with accessory after the fact to the robbery. (ECF Nos. 32, 34). Defendant
 4 Kimball entered a plea of not guilty and a jury trial was commenced on October 19, 2015.
 5 After two days of testimony and evidence, including Codefendant Garcia's testimony
 6 implicating Defendant Kimball as the robber, the jury returned a guilty verdict on
 7 October 21, 2015. (ECF No. 91).

8 Defendant's trial counsel filed a motion for new trial alleging a *Brady* violation
 9 and concurrently filed a "Declaration Re: Conflict" indicating that Defendant Kimball
 10 sought to pursue a claim of ineffective assistance of counsel during trial and requesting the
 11 appointment of new counsel. (ECF No. 113). Over the Government's objection, the
 12 Court appointed new counsel and continued the hearing on Defendant's motion for new
 13 trial. (ECF No. 126). Defendant subsequently filed a second motion for new trial on the
 14 grounds that his trial counsel was ineffective. (ECF No. 146).

15 **Analysis**

16 **1. Defendant's First Motion for New Trial**

17 In his first motion, Defendant contends that a new trial is warranted because the
 18 Government failed to disclose that a reward had been offered by the United States Postal
 19 Inspection Service for information leading to the arrest of the robber. Defendant
 20 contends that this evidence could have been used to cast doubt upon the credibility of
 21 witnesses called by the Government by suggesting that their testimony was colored by a
 22 desire to earn the reward money. The Government responds that no relief is warranted
 23 because the evidence was not favorable to the defense and because Defendant cannot
 24 establish prejudice resulting from the non-disclosure.

25 The law governing the prosecution's obligation to disclose evidence beneficial to
 26 the defense is well-settled. *United States v. Sarno*, 73 F.3d 1470, 1504 (9th Cir. 1995).
 27 A prosecutor's failure to disclose evidence favorable to an accused violates due process
 28 when the evidence is material either to guilt or punishment. *Id.*, citing *Brady v.*

1 *Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667 (1985). The
2 rule of *Brady* and its progeny applies even in the absence of a defense request and
3 extends to both exculpatory and impeachment evidence. *Id.*, citing *Kyles v. Whitley*, 514
4 U.S. 419, 432 (1995) and *Bagley*, 473 U.S. at 682. Evidence is held to be material "if
5 there is a reasonable probability that, had the evidence been disclosed to the defense, the
6 result of the proceeding would have been different." *Id.*, quoting *Kyles*, 514 U.S. at 433.
7 A "reasonable probability" of a different result is shown when the Government's
8 evidentiary suppression "undermines confidence in the outcome of the trial." *Id.*

9 Based upon the uncontested declaration of Postal Inspector Tsai (ECF No. 124-1),
10 the Court finds that the reward offer was not favorable to the defense because each
11 government witness to testify at trial was either not aware of the reward, or if aware, was
12 not eligible to receive it. Thus, the fact of the reward carried no impeachment value
13 because it could not have served as a motivating factor for any of the witnesses'
14 testimony. Furthermore, the witnesses' lack of awareness or ineligibility for the reward
15 cuts against any possible showing of prejudice. Even if the witnesses had been cross-
16 examined about the reward offer, the substance of their testimony would not have
17 changed. Therefore, the Court cannot conclude that the result of the proceeding would
18 have been different, or that the failure to disclose the reward offer undermines confidence
19 in the jury's verdict.

20 2. Defendant's Second Motion for New Trial

21 In his second motion for a new trial, Defendant claims that trial counsel was
22 ineffective in several regards: Defendant contends that trial counsel failed to investigate
23 the case and present exculpatory eyewitness evidence; failed to call investigating police
24 officers; failed to call a forensic chemist; failed to call into question the cooperating
25 codefendant's description of the gun; and otherwise failed to vigorously cross-examine
26 the cooperating codefendant, Amanda Garcia. The Government responds that
27 Defendant's second motion for new trial is untimely, that the ineffective assistance of
28 counsel claims should not be considered pre-judgment, and that Defendant's ineffective

1 assistance of counsel claim fails on the merits.

2 As an initial matter, the Court sees no good reason to preempt Defendant's motion
3 on timeliness or pre-judgment justiciability grounds, particularly now that significant
4 time and resources have been expended to reach this juncture.¹ The Court has the
5 discretion to hear both an untimely motion for new trial² and an ineffective assistance of
6 counsel claim brought pre-judgment.³ The Court maintains its belief that it is in a better
7 position to determine the issues now, while the trial is fresh in the Court's memory and
8 Defendant has the assistance of counsel, than to delay any inquiry into Defendant's
9 ineffective assistance of counsel claim until a Section 2255 motion is filed. Furthermore,
10 the Court would prefer to hear and consider Defendant's claims now in order to ensure its
11 own confidence in the fairness of the trial proceedings. Thus, the Court will consider
12 Defendant's claim on the merits.

13 Rule 33 of the Federal Rules of Criminal Procedure provides in relevant part that
14 "the court may vacate any judgment and grant a new trial if the interest of justice so
15 requires." A district court's power to grant a motion for new trial is "much broader than
16 its power to grant a motion for judgment of acquittal." *United States v. Alston*, 974 F.2d
17 1206, 1211 (9th Cir. 1992). If the court determines "that a serious miscarriage of justice
18 may have occurred, it may set aside the verdict, grant a new trial, and submit the issues
19 for determination to another jury." *Id.* at 1211–12.

20 To prevail on an ineffective assistance of counsel claim, a defendant must show

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22 ¹ The Government opposed Defendant's request for the appointment of counsel when it
23 was made six months ago and took the position that a pre-judgment motion for new trial based
24 upon ineffective assistance of counsel would not be appropriate in this case. The Court
25 nevertheless exercised its discretion to appoint new counsel and continued the hearing on the
26 motion for new trial so that any additional claims could be presented by new counsel. ECF Nos.
27 126, 129.

28 ² Defendant's second motion for new trial, although filed outside the 14-day time period
established by Rule 33(b)(2), was filed in accordance with the time limits established by the
Court. Rule 33 is not jurisdictional and is therefore subject to the time-modification provisions
of Rule 45(b) of the Federal Rules of Criminal Procedure. *United States v. Owen*, 559 F.3d 82,
83-84 (2nd Cir. 2009), citing *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam).

³ See *United States v. Steele*, 733 F.3d 894, 897 (9th Cir. 2013).

1 that counsel's performance was deficient and that this deficient performance prejudiced
2 the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish
3 prejudice, a defendant "must show that there is a reasonable probability that, but for
4 counsel's unprofessional errors, the result of the proceeding would have been different."
5 *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence
6 in the outcome." *Id.* The Court need not address both prongs if the defendant alleging
7 ineffective assistance makes an insufficient showing on one. *Id.* at 697 (stating, "If it is
8 easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,
9 which we expect will often be so, that course should be followed.").

10 In this case, the Court has not been presented with any evidence to determine
11 whether trial counsel's performance "fell below an objective standard of reasonableness
12 under prevailing norms of practice." *Id.* at 687-88. Although Defendant argues that the
13 failure to interview witnesses establishes deficient performance *per se*, the evidence
14 before the Court is insufficient to determine what, if any, witnesses were interviewed by
15 trial counsel and whether an adequate investigation was performed by him.

16 Defendant has demonstrated that an investigator was hired during the days before
17 trial to "assist [defense counsel] in gathering statements from individuals involved with
18 the [Defendant's] case." (Declaration of Michael Bea, ECF No. 146-3). According to the
19 investigator, he was only directed to attempt to contact two witnesses who were eye-
20 witnesses to the robbery (Utes/Meyers) and that instruction did not occur until the trial
21 began. *Id.* However, it is not known whether trial counsel himself interviewed any of the
22 witnesses, what other investigation was conducted prior to trial, or what strategic
23 determinations impacted counsel's decisions.⁴

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26 ⁴ At the oral argument, current counsel presented a declaration from a second investigator
27 indicating that she had contacted several witness in the weeks leading up to the hearing, but the
28 declaration does not address the question of whether trial counsel had contacted them previously.
More importantly, the declaration fails to reveal any witness statement inconsistent with the
evidence presented at trial.

1 Neither party has offered any evidence from trial counsel regarding his actions or
2 strategy in this case.⁵ Accordingly, the Court makes no finding regarding counsel's
3 performance in this matter. However, the Court finds this determination unnecessary
4 because Defendant has failed to demonstrate the second prong of the *Strickland* analysis
5 – a reasonable probability that, but for counsel's unprofessional errors, the result of the
6 proceeding would have been different.

7 Defendant's motion identifies three areas of evidence impacted by the allegedly
8 deficient performance of counsel: the eyewitness identifications of the robber; the
9 forensic evidence tying the vehicle used in the robbery to the defendant; and the
10 reliability and bias of Codefendant Garcia. However, Defendant makes no showing that,
11 had trial counsel acted in the manner now suggested, the evidence at trial would have
12 differed in any significant way.

13 First, with respect to the eyewitness descriptions of the robber, there is no dispute
14 that the descriptions, as reflected in the police reports, contain varying details about the
15 robber. According to Defendant, at least four of the descriptions describe the robber as a
16 black male, many describe the suspect as a young man, and there a variety of clothing
17 descriptions. As previously discussed, Defendant, a 50-year old Caucasian male, faults
18 trial counsel for failing to interview the eyewitnesses, and also for failing to call
19 witnesses at trial to testify regarding the discrepancies in the eyewitness descriptions of
20 the robber.

21 However, trial counsel *did* present evidence at trial that at least three witnesses to
22 the robbery described the robber as being a black male. Although this evidence was
23 presented through stipulation and cross-examination of the case agent, the jury was aware
24 that several witnesses had described the robber as a black male. In the Court's view, any
25 further benefit to be gained through additional testimony regarding the discrepancies
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27 ⁵ In his Declaration Re: Conflict, trial counsel, aware of Defendant's desire to request a
28 new trial on the basis of ineffective assistance of counsel, indicated he would not file a motion in
that "there were decisions I made as a tactical matter." (ECF No. 113).

1 between eyewitness descriptions of the robber is vastly exaggerated by Defendant, given
2 the circumstances of this case.

3 The evidence at trial, which included video surveillance footage of the robbery
4 and the robber from multiple vantage points, established that the robber undertook
5 significant efforts to conceal himself. Victims and eyewitnesses described the robber as
6 being “covered from head to toe,” wearing a hoodie, sunglasses, gloves, and long baggy
7 shorts with knee socks. Codefendant Garcia testified that prior to the robbery, Defendant
8 painted his exposed skin with black face paint stolen from Party City. Thus, the fact that
9 witnesses had difficulty uniformly describing the physical characteristics of the robber is
10 not particularly surprising, and not particularly useful because this was simply not a case
11 which rested on the strength of eyewitness identification testimony. None of the
12 testifying witnesses, other than Codefendant Garcia, identified Defendant Kimball as the
13 robber. Furthermore, the jurors could view for themselves the appearance of the robber
14 from the surveillance footage. Thus, the Court is not persuaded that pointing out
15 additional discrepancies in various eyewitness identifications of the robber would have
16 had any impact on the result of the proceedings.

17 Defendant also faults trial counsel for failing to call a forensic chemist to testify as
18 to the lack of scientific evidence linking Defendant to the robbery. Again, this evidence
19 was elicited by trial counsel, although not in the manner Defendant contends it should
20 have been. Through cross-examination of the case agent, trial counsel established that a
21 forensic search of the vehicle used in the robbery was conducted several weeks after the
22 robbery and that agents didn’t find any trace evidence, fingerprints, or fiber evidence.
23 (ECF No. 136 at 101-02). Thus, the jury knew of the lack of forensic evidence in this
24 case. Furthermore, as the Government points out, trial counsel's failure to present this
25 evidence through a forensic chemist precluded the Government from questioning the
26 chances of finding reliable forensic evidence in a rental vehicle which had allegedly been
27 cleaned up and was not discovered until two weeks after the robbery.

1 Similarly, the credibility of Codefendant Garcia was vigorously attacked by trial
2 counsel, although not in the manner Defendant contends it should have been. Defendant
3 argues that trial counsel failed to call into question Codefendant Garcia's description of
4 the gun and otherwise failed to rigorously cross-examine her. However, Codefendant
5 Garcia's description of the gun as a black toy gun with an orange tip was brought out by
6 trial counsel through cross-examination of the case agent, as was the fact that the gun was
7 described by witnesses as silver-colored. Moreover, the coloring of the gun was plainly
8 visible to the jury in numerous trial exhibits, including the surveillance video from the
9 robbery. Trial counsel also conducted an extensive cross-examination of Codefendant
10 Garcia, establishing the favorable disposition of her case pursuant to plea agreement, her
11 drug use, her repeated meetings with the Government, and the multiple versions of her
12 accounts of the day of the robbery. Trial counsel also went through multiple inconsistent
13 statements of Codefendant Garcia during his cross-examination of the case agent.

14 Thus, in spite all of the errors Defendant alleges to have occurred, the jury was
15 nevertheless presented with evidence that witnesses described the robber as a black man,
16 that there was no forensic evidence linking Defendant to the robbery, that Codefendant
17 Garcia's description of the gun was inaccurate, and that she was a flawed witness in many
18 other regards. Therefore, particularly in light of the strength of the other evidence in this
19 case, including the corroboration of key aspects of Codefendant Garcia's testimony, the
20 Court is not able to conclude that the result of the trial would have been any different had
21 trial counsel taken the approach now urged by Defendant.

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Conclusion

For the reasons set forth above, the Court is not persuaded that the interest of justice would be served by granting a new trial in this matter. Accordingly both of Defendant's motions for new trial are **Denied**.

IT IS SO ORDERED.

DATED: September 8, 2016



Honorable Janis L. Sammartino
United States District Judge